BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF DAVID L. SPARKS, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 77-43 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PER W. A. GISSBERG:

This appeal came on for an informal hearing before the Board, W. A. Gissberg (Chairman and presiding), Chris Smith and Dave J. Mooney on July 18 and 19, 1977, in Spokane, Washington. Appellant, David L. Sparks, asks that he be allowed to transfer his ground water permit to a new location.

Appellant was represented by his attorney, Lawrence L. Tracy; respondent, Department of Ecology, was represented by Robert E. Mack, Assistant Attorney General.

Having heard the testimony and considered the briefs and argument, and being fully advised, the Board makes and enters the following

FINDINGS OF FACT

I

Appellant, being the owner of land in Section 11, Township 18, Range 24 East of the Willamette meridian, Grant County, jointly applied for a change in the place of use and point of withdrawal of a certain water permit right[1] which he had acquired by assignment from one Albert J. Treiber to whom it had been originally issued in 1971 for a well 500 feet in depth. The works allowed by the permit have never been fully completed nor has water been applied to irrigation although the well[2] is drilled to a depth of approximately 330 feet and water is cascading therein. Although the development schedule of the permit, as extended, has not been met,[3] appellant seeks only the same amount of water from the new wells as that authorized by the permit.

II

Both the old and the new well are situated within the boundaries of the Quincy subarea, although the new wells are 25 miles distant from the old well. The old well is at an elevation of 1860 feet above mean sea level while the new wells are at an elevation of 1205 feet. The

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1. The permit has not been certificated.

2. Hereafter the well and its site authorized by the permit will be referred to as the old well. The wells and the site to which the appellant seeks to change the place of use and point of withdrawal will hereafter be referred to as the new wells.

3. The permit was assigned to appellant in June of 1976 before th end of the development schedule had been reached.

hydraulic gradient of the ground waters of the old and new wells eventually is southerly toward the Pot Holes Reservoir, although at the old site the movement of the water is first east to southeast before swinging south.

III

In March, 1973, acting pursuant to RCW 90.44.130, the Department of Ecology (DOE) established the boundaries "and depth zones of the Quincy ground-water subarea as the initial step toward development of a proper ground-water program for this part of the Columbia basin."[4] The DOE's predecessor had curtailed further ground water development in the "Quincy Basin" in March, 1969, "pending the outcome of detailed ground-water investigations to determine if further appropriation of public ground waters in this area should be allowed."[5] Following extensive study and an inventory or accounting of all existing water rights and certificates,[6] the DOE, in January, 1975, adopted regulations for the administration of the ground waters within the subarea and zones.[7] The statute, RCW 90.44.130, which authorizes the DOE to designate subareas or depth zones requires that "such area or zone

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4. WAC 173-124-020.

5. WAC 173-124-010.

6. The instant permit has been "accounted for" as a well which has the right to withdraw water from the deep management unit and has and will be considered in the inventory for determining whether additional water is available for appropriation. While the DOE has placed a hold on new permits, applications for such, assuming that additional water is found to be available for appropriation, will be processed and enjoy a priority in the order and sequence of their respective filing dates.

7. WAC 173-134-010.

shall . . . be so designated as to enclose a single and distinct body of public ground water." The real purpose of establishing both the Quincy subarea and the zone was, however, to settle a dispute between the United States of America and the State of Washington over the artificially stored ground water. Consequently, the dividing line between the shallow and deep management units was artificial in that it did not represent a line between two separate and distinct physical water bearing stratas, but only a legal line which was arbitarily chosen as a means of settling a legal dispute between two entities of government. Nonetheless, the DOE regulations treat the shallow management unit as one body of water and the deep management unit as another.

IV

The bottom of the old well is, or would be if drilled to the depth authorized, in the deep management unit of the Quincy subarea. At the hearing on this appeal, appellant's attorney represented that the new wells would be drilled into the deep management unit, at least a depth of more than 200 feet into the Quincy basalt zone. Thus, both the old and the new wells would draw water from the same body of ground water, i.e., the deep management unit. Based upon an agreement between Treiber and appellant, the old well will be discontinued and abandoned if appellant's application is approved.

V

The experts for appellant and respondent differ in their respective opinions as to whether the old and the new wells would draw from the same body of ground water.

The new well, when withdrawing water at the maximum rate authorized by the permit, if cased to 200 feet into the basalt, would not measureably effect the existing shallow wells nor would there by any detrimental effect or impairment of other wells.

VI

The regional supervisor of the DOE made findings (see Exhibit R-1, page 6) concerning all things investigated by it and found that:

> 4. Moving an undeveloped permit from the extreme fringe area of the Quincy Sub-Area to a much more sensitive core area would not be in the public interest.

VII

Any Conclusion of Law hereinafter stated which may be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

In determining whether the DOE should be required to approve appellant's application for a change in the place of diversion and use of public ground water, the threshold issue for our determination is whether RCW 90.44.100[8] is solely applicable or whether the provisions of RCW 90.03.380,[9] as the DOE contends, are also applicable. At the outset, we note that by virtue of RCW 90.44.020,

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8. That 1945 statute governs the amendment of permits for withdrawal of public ground waters.

9. The 1917 surface water code.

> This chapter (RCW 90.44) regulating and controlling ground waters of the state of Washington shall be supplemental to chapter 90.03 RCW, which regulates the surface waters of the state, and is enacted for the purpose of extending the application of such surface water statutes to the appropriation and beneficial use of ground waters within the state.

Thus, there can be no doubt that the provisions of RCW 90.44 and 90.03 must be construed together and therefore we hold that we must examine both RCW 90.44 and 90.03 in determining the statutory requirements for a change in the place of diversion of public ground water.

II

The facts of this case have established that neither appellant nor his predecessor in interest has applied the right to the use of the water of the permit to a beneficial use. DOE contends that no change of the point of diversion can be authorized by it unless the water has been applied to a beneficial use. That position is based upon the DOE construction of RCW 90.03.380, the pertinent part on which it relies states:

> The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used . . . .[10]

We reject the contention of DOE and agree that appellant's construction of it is correct, namely, the statute expresses a rule of real property law and that, as was observed in Lawrence v. Southard, 192 Wash. 287 at 301 (1937), it "is a legislative confirmation of Longmire v. Smith, 26 Wash. 439" (1901).

A permit for the withdrawal of water may be amended by the DOE,

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10. Clearly the use of water was and is an appropriate subject for a statutory declaration of consumer rights.

in a proper case, by a change in the point of diversion even though the water has not yet been appropriated to a beneficial use.

Upon the issuance of a permit the holder acquires a right to withdraw water in order that it may be applied to a beneficial use. The permit is a limited right, but nonetheless a right. A permit ripens into a vested right, i.e., a water right certificate, when the water withdrawn under the permit has been applied to a beneficial use, that is the "appropriation has been perfected."[11]

Furthermore, RCW 90.03,380 provides, in part:

> The point of diversion of water for beneficial use or the purpose of use may be changed if such change can be made without detriment or injury to existing rights.

This cannot be construed to mean that the point of diversion may be changed only if the water has already been applied to a beneficial use; rather, it restricts the change of point of diversion of water to cases in which the water will, after the change, be applied to a beneficial use.

Thus, RCW 90.03.380 authorizes the change of the point of diversion of water, as the statute plainly states, upon application and publication of notice thereof, when and if

> . . . it shall appear that . . . such change may be made without injury or detriment to existing rights. . . .

III

The DOE has cited Haberman v. Sander, 166 Wash. 453 (1932), a case construing the above last quoted portion of the statute which is

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11. RCW 90.03.330

now codified as RCW 90.03.380, as authority for the proposition that a change in point of diversion cannot be allowed if its effect is to impair the rights of other appropriators, even those who are junior to the appropriator seeking the change. In our opinion, the holding in Haberman was that a change of point of diversion of waters of a creek by the lessee of a senior appropriator's water right will be enjoined when the change cannot be made without infringing upon prior vested and adjudicated rights involving a "lessening of their [the junior] domestic water supply, in the inferior quality of their orchard fruit and in the effect upon trees." In other words, that case is authority for enjoining a change of the point of diversion of a senior right when the upper, but junior, stream user's vested right to withdraw water is physically impaired. Such are not the facts before this Board. Rather, there is no evidence that there are any junior water users whose authorized withdrawals of water from the deep management unit will be impaired by a change in the point of diversion. See Finding of Fact V.

IV

We turn to an examination and construction of RCW 90.44.100 to determine the requirements for a substitution "of withdrawal at a new location." In our analysis, we shall attempt to give effect to its plain meaning and all of its parts. The entire section states:

> Amendment to permit or certificate. After an application to, and upon the issuance by the supervisor of water resources [predecessor agency to DOE] of an amendment to the appropriate permit or certificate of ground water right, the holder of a valid right to withdraw public ground waters may, without losing his priority of right, construct wells or other means of withdrawal at a new location in substitution for or in addition to those at the original location, or he may change the manner or the place of use of the water: Provided,

> however, That such amendment shall be issued only after publication of notice of the application and findings as prescribed in the case of an original application. Such amendment shall be issued by the supervisor only on the conditions that: (1) The additional or substitute well or wells shall tap the same body of public ground water as the original well or wells; (2) use of the original well or wells shall be discontinued upon construction of the substitute well or wells; (3) the construction of an additional well or wells shall not enlarge the right conveyed by the original permit or certificate; and (4) other existing rights shall not be impaired. The supervisor may specify an approved manner of construction and shall require a showing of compliance with the terms of the amendment, as provided in RCW 90.44.080 in the case of an original permit.

The first sentence, down to the proviso, is a legislative pronouncement that if an amendment to either a "permit or certificate" is issued by the Department, the holder of a valid right to public ground waters [the owner of the permit or certificate] is authorized to construct wells at a new location or change the place of use of the water without losing his priority of right. The thrust of the sentence is to authorize a permit change in place of use and withdrawal of water without loss of priority.

The one sentence proviso requires that before the DOE is empowered to grant an application for an amendment to a permit, the Department must publish notice of the application and make "findings as prescribed in the case of an original application." To determine what "findings" are required before DOE can grant a permit on an original application, we are directed by RCW 90.44.060 to turn to RCW 90.03.250 through 90.03.340, "the provisions of which sections are hereby extended to govern and to apply to ground water . . . permits that shall be issued pursuant to such applications . . . ." RCW 90.03.290 prescribes the findings on an original application to be:

> . . . The supervisor shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if he shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, he shall issue a permit . . . . (Emphasis added.)

The third sentence of RCW 90.44.100 (immediately following the proviso) prescribes the conditions on the issuance of an amendment to the permit. They are that:

> (1) The . . . substitute well . . . shall tap the same body of public ground water . . .[12].
> (2) use of the original well . . . shall be discontinued upon construction of the substitute well . . .[13].
> (3) the construction of an additional well . . . shall not enlarge the right conveyed by the original permit . . .[14].
> (4) other existing rights shall not be impaired. . . .[15]

V

While appellant's proposed change of point of diversion meets all the conditions set forth in RCW 90.44.100, the required determinations of RCW 90.03.290, as we have pointed out, are also applicable. They are:[16]

(1) availability of water[17]

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12. It does. See Finding of Fact IV. However, the depth to which the new wells may be drilled is limited to the same geological and hydrological body of ground water even though that may not be the same as the depth described as the deep management unit. See Shinn v. DOE, PCHB 1117-A and B.

13. It will be. See Finding of Fact IV. Furthermore, this statutory condition is a condition subsequent to any order approving the change.

14. It does not. See Finding of Fact I.

15. They will not. See Finding of Fact V.

16. Stempel v. Dep't of Water Resources, 82 Wn.2d 109 at 115 (1973).

17. It is. See Finding of Fact III.

(2) beneficial use[18]
(3) Will appropriation impair existing rights[19]
(4) Will the appropriation detrimentally affect the public welfare.[20]

VI

We have found[21] that the amount of water withdrawal authorized by the instant permit at the original well site was taken into account in determining the quantity of water which was being or could be appropriated by permits and certificates within the Quincy subarea deep management unit. Nonetheless, to allow a change of the point of diversion of this permit a distance of twenty-five miles within the subarea would be precedent setting. It would, if followed by others, substantially and detrimentally affect and subvert the comprehensive regulatory and management scheme adopted by the DOE for the Quincy subarea under which pending applications have not been acted upon since 1969. That program[22] itself states in part:

> . . . This state program is designed to protect both the public interest and private rights and interests . . .

"Public interest," as used in the regulation, and "public welfare" as

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18. Irrigation is a beneficial use. RCW 90.54.020(1).

19. It will not. See Finding of Fact V.

20. We conclude that it will. See Conclusion of Law VI and Finding of Fact VI.

21. See Finding of Fact III.

22. WAC 173-134-010.

used in the statute have the same connotations.[23]

The DOE, in the instant case, has made a determination that moving this "undeveloped permit" would not be in the public interest.[24]

We agree with the DOE in that regard and repeat the concern, although dicta, of the Supreme Court of this state as enunciated in Haberman (supra) that:

> . . . if appellants [senior appropriators] may change the point of diversion of the . . . water, a dangerous precedent will be set, which might well result in a promiscuous scramble by water appropriators to move their intakes upstream, with the result that many evils will follow.

The same vice may, and probably will, follow if the old well place of diversion can be moved in the instant case. If "evils will follow," that course of action would not be in the public welfare.

VII

In summary, we hold: (1) that an application for a change in the place of use and point of withdrawal of a ground water right permit must meet the statutory requirements set forth not only in RCW 90.44.100, but RCW 90.03.290 and 90.03.380 as well; (2) a change in the point of diversion in this case would be contrary to the public welfare requirement of RCW 90.03.290; (3) that even though appellant meets all of the other statutory requirements and conditions for such change, his application was properly denied based solely upon the public welfare requirement; and (4) the action of the DOE in denying the application should be affirmed.

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23. Hutchins, Water Right Laws in the Nineteen Western States, Vol. 1, page 409.

24. See Finding of Fact VI.

VIII

Any Finding of Fact which may be deemed a Conclusion of Law is hereby adopted as such.

ORDER

The action taken by the Department of Ecology which denied appellant's application is affirmed.

DATED this 19th day of September, 1977.

POLLUTION CONTROL HEARINGS BOARD

W. A. GISSBERG, Chairman

DAVE J. MOONEY, Member

CHRIS SMITH, Member